IN THE SUPREME COURT OF THE STATE OF MONTANA

DA-10-0226

PARK PLACE APARTMENTS, L.L.C.,
Plaintiff/Appellant

vs.

FARMERS UNION MUTUAL INSURANCE COMPANY AND
WILLIAM F. WILHELM
Defendants/Appellees

AMICUS CURAIE BRIEF OF THE MONTANA TRIAL LAWYERS ASSOCIATION

ON APPEAL FROM THE MONTANA ELEVENTH JUDICIAL DISTRICT COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Montana State Cases

Other State Cases

Federal Cases

State Statutes

Other Authorities

I. INTRODUCTION

This case illustrates the difficulty even sophisticated consumers experience when trying to obtain appropriate insurance coverage for their needs, and further illustrates the need for insurance agents to be held to a professional standard of care. A professional standard of care allows the trier of fact to consider the totality of the circumstances surrounding the insurance transaction within the standard of care for the industry. The effort of courts to piecemeal insurance transactions into various parts wherein the liability of an agent is only triggered when the consumer makes a specific request for a specific type or amount of insurance belies the reality of the relationship between the consumer and the agent, the reality of the insurance industry, and the reality of how consumers arrive at the decision to request particular coverage. This legal fiction establishes an artificial standard of care, unwarrantedly different from all other professionals in Montana.

Accordingly, MTLA requests the Court reverse the district court's decision granting *Defendant Wilhelm's Motion for Summary Judgment*, grant *Plaintiff's Motion for Summary Judgment Against Defendant Wilhelm*, or, in the alternative, remand for consideration of Defendant Wilhelm's liability to the Plaintiff under a professional standard of care requiring insurance agents to exercise the skill and knowledge consistent with the training and experience required for their profession.

II. LEGAL ARGUMENT

A. Standard of Review

"Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Monroe v. Cogswell Agency et al,* 2010 MT 134, ¶11, ___ Mont. ___, ___ P.3d ___ . "[A]t the summary judgment stage the moving party bears the initial burden and must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact." *Monroe*, at ¶29 (internal citation omitted). This Court reviews a district court's summary judgment decision de novo using the same criteria as the district court. *Monroe*, ¶11.

B. The district court erred in granting summary judgment to Wilhelm and denying summary judgment to Hileman regarding breach of the duty to procure requested insurance.

1. Hileman provided uncontested lay and expert testimony that Wilhelm had failed to meet the standard of care for insurance agents.

Plaintiff alleged in the complaint that Wilhlem had breached his duty of reasonable professional care by failing to obtain the coverage that had been requested for the entire property. (Cas. Co. Doc. 1, ¶¶20-23) In support of this allegation Hileman disclosed the expert testimony of Jim Conkle regarding the standard of care of an insurance agent. Mr. Conkle opined that under the circumstances of this case, the failure to provide coverage on all structures located

on the property would have fallen below the applicable standard of care—unless Wilhelm gave specific notice the structure was not covered. (Flthd. Co. Doc. 38, *Aff. Conkle*, ¶4) Wilhelm agreed it would have been his responsibility to advise Hileman if one of the structures was not covered. (*Depo. Wilhelm*, p. 36:11-19) It is undisputed Hileman was never put on notice the carport was not covered. Mr. Conkle's expert opinion is consistent with FUMIC's internal policies and procedures requiring coverage for each building located on commercial property. (*Depo. Wilhelm*, pp. 23:18-24, 24:7-14)

Moreover, Hileman provided substantial credible evidence he reasonably relied on Wilhelm's advice regarding the type of coverage to obtain, as well as reasonably believed he had obtained the requested coverage on the entire property. Hileman and Wilhelm had a longstanding history and Wilhelm was familiar with Hileman's commercial insurance needs. (*Depo. Hileman*, p. 16:10-23) Hileman contacted Wilhelm about procuring insurance for the property in anticipation of purchasing it, requested casualty and liability insurance for the property, and gave Wilhelm a copy of the appraisal to ensure he had "full coverage" on the property consistent with its fair market value. (*Depo. Hileman*, pp. 16:2-5, 21:15-21, 22:5-14)

Wilhelm inspected and photographed the property as required by FUMIC so that FUMIC would be aware of all structures located on the property. (*Depo.*

Merriman, pp. 51:15-17, 52:2-8) Wilhelm then prepared and reviewed the insurance application with Hileman and explained there was coverage for structures on the property, regardless of whether they were specifically identified. (*Depo. Hileman*, p. 23:5-23) Wilhelm explained the reason only two of the buildings were specifically identified was that the insurer wanted to know which buildings people were coming in and out of most often. *Id.*

Based on Wilhelm's representations, Hileman reasonably believed there was insurance on all the structures located on the property. (*Depo. Hileman*, p. 24:3-5) Indeed, Wilhelm himself testified it was his intent to insure all the structures, and he in fact thought there was insurance on all the structures located on the property. Wilhelm admitted in his deposition he never would have sold a commercial policy that did not cover all the structures on the property without specifically telling the client a structure was not covered. (*Depo. Wilhelm*, p. 38:11-18) He further agreed it would have been unreasonable to sell a policy that did not cover all of the structures. (*Depo. Hileman*, pp. 36:1-5, 38:8-18)

In considering the liability of Wilhelm, the district court limited its analysis to whether (1) a request for certain coverage was made, and (2) the agent agreed to seek additional coverage. (Flthd. Co. Doc. 10, pp. 3-4). The district court found Hileman's allegations failed both prongs of this analysis as there was no genuine issue of material fact: (1) Hileman's request for full coverage on the property

consistent with the values delineated in the appraisal, including casualty and liability coverage, was too vague to trigger a duty to procure coverage for the carport, and (2) Wilhelm had never agreed to procure insurance on the carport. The district court's conclusion, in favor of Wilhelm, that there are no genuine issues of material fact is unsupportable as there was a specific request with a tacit admission from the agent he thought the request had been satisfied.

2. The district court's focus on whether the duty to procure insurance had been triggered by a specific request allowed it to ignore the undisputed standard of care for an insurance agent.

More troubling and concerning is that the district court's analysis allowed it to completely ignore the undisputed expert testimony of Mr. Conkle regarding the standard of care—which was in conformance with FUMIC's own policies for agents selling this type of coverage. What results is an utter disconnect between what the industry expects as a general standard of care for its agents, and how those agents are subsequently held accountable by the courts.

Accordingly, should the Court determine there are genuine issues of material fact precluding summary judgment on behalf of either party, MTLA requests the case be remanded for the district court to consider the liability of Wilhelm under a professional standard of care that is informed by expert testimony, similar to every other professional liability claim.

C. As a matter of public policy, it is necessary to hold insurance agents to a professional standard of care to protect insurance consumers within the context of a complex, highly regulated, multi-billion dollar industry.

According to the Montana State Auditor's Office, insurance is the third largest industry in Montana, with insurance companies doing more than $2 billion worth of business every year.[1] The Auditor's Office licenses and processes continuing education filings for 24,000 individual and agency producer licensees.[2] To become a licensed insurance consultant or producer in Montana, one must undertake a rigorous process including a background check, an examination for each type of insurance sold, and a demonstration that the applicant has experience or training or otherwise is qualified in the kind or kinds of insurance for which the applicant applies to be licensed and is familiar with the insurance code. Mont. Code Ann. §33-17-211. To then maintain the license the licensee must complete 24 hours of annual continuing education, including ethics and insurance law. Mont. Code Ann. §33-17-1203. In short, the requirements are similar to those for being licensed to practice law in Montana.

That the regulation of insurance agents is in the best interest of and for the protection of the public has been recognized for decades. In *Robertson v. People of State of Cal.*, 328 U.S. 440, 448 (1946), the U.S. Supreme Court found that the

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[1] Montana Commissioner of Securities and Insurance, *Insurance Division*, http://www.sao. mt.gov/ insurance/index.asp (7/20/09).
[2] *Id.*

activities of an insurance agent "were of a kind which vitally affect the welfare and security of the local community, the state and their residents." Indeed, the purpose of the above statutes regulating insurance agents is to "protect Montana insurance consumers." See Title 33, Chapter 17, Part 2, *1987 Statement of Intent,* (2). However, in order to adequately protect the insurance consumer it is necessary to have a legal remedy which holds insurance agents accountable as professionals not just to governmental regulatory bodies, but also to insureds for all harm suffered as a result of the insurance agent's breach of duty. This case highlights the complexity of insurance not only for lay consumers, but even for consumers with legal training.

D. Insurance agents should be subjected to the same standard of care as all other professionals.

Public policy and consumer protection concerns mandate insurance agents be held to the same standard of care as other professionals. The failure to do so places insurance agents in "the same category as one selling shoes or a used car, with no higher duty than a salesperson of such products" not to negligently misrepresent what the product is. Cohen, Stewart L., *Liability of Insurance Sales Professionals for Negligent "Errors and Omissions,"* 70 Pa. B. A. Q. 56 (1999). Instead:

> the responsibilities and obligations imposed by law must accurately reflect the realities of insurance industry customs and concomitant expectations of parties to insurance contracts supports this court's decision. An insurance

> agent's expertise includes knowledge of available insurance coverage of which the average consumer is frequently unaware. The consumer is encouraged by his or her insurance agent to look to the agent for assistance in these matters.

Peterson v. State Farm Ins. Co., 133 Pitts. L.J. 437, 438 (Allgy. Cty. 1985).

1. Insurance agents are professionals.

At the heart of this dispute is whether an insurance agent is merely a salesperson, or a professional. A growing number of jurisdictions have recognized a general reasonableness standard of care is appropriately applied to insurance agents in a variety of circumstances. Insurance agents are professionally trained to manage a consumer's risk for the preservation of assets. There are detailed licensing requirements under state law, and numerous organizations exist to promote the professional status of insurance agents, such as the Council of Insurance Agents and Brokers, Independent Insurance Agents and Brokers of America (IIABA), and the Strategic Independent Agents Alliance. Likewise, insurance agents commonly advertise themselves as professionals. It can no longer be denied that insurance agents are sophisticated professionals with special knowledge who are trained to navigate a very complex system.

2. General standard of care applicable to all professionals should also be applicable to insurance agents.

The standard of ordinary care articulated in Mont. Code Ann. §27-1-701, applies to professionals in that the duty owed must be consistent with the level of

care required by the professional's training and experience. "[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade . . ." RESTATEMENT (SECOND) OF TORTS § 229A (1965). In other words, a professional "has a duty to exercise the skill and knowledge . . . consistent with the training and experience required for his profession." *Romans v. Lusin*, 2000 MT 84, ¶17, 299 Mont. 182, 997 P.2d 114. This professional duty of care has been recognized for many professions and trades, including physicians, attorneys, bankers, real estate agents, physical therapists, accountants, dentists, orthodontists, architects, manufacturers of pharmaceuticals, abstractors of title, and surveyors. *See Romans*, at ¶17; *Webb v. T.D.*, 287 Mont. 68, 77, 951 P.2d 1008, 1014 (1997); *Carlson v. Morton*, 229 Mont. 234, ___745 P.2d 1133, 1136-1137 (1987); *May v. Era Landmark Real Estate of Bozeman*, 2000 MT 299, 302 Mont. 326, 15 P.3d 1179; *Lindey's, Inc. v. Professional Consultants, Inc.*, 244 Mont. 238, 797 P.2d 920 (1990).

There is no basis not to hold insurance agents to the same standard of care as all other professionals:

> When an insurance agent performs his services negligently, to the insured's injury, he should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services.

McAlvain v. General Ins. Co. of America, 554 P.2d 958 (Idaho 1976).

It is appropriate to fashion a standard of care comparable to that of other professions, which takes into consideration the unique circumstances of each relationship and is based on the reality of the insurance industry.

3. Expert testimony may be required on the standard of care in certain circumstances.

In most circumstances, establishing the standard of care owed by a professional that is commensurate with the training and experience required for the profession must be established by expert testimony. The rationale for requiring expert testimony in professional negligence actions has been summarized by Professors Prosser and Keeton:

> Professional persons in general, and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability.
>
> * * *
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> Since juries composed of laymen are normally incompetent to pass judgment on [such] questions . . . it has been held in the great majority of malpractice cases that there can be no finding of negligence in the absence of expert testimony to support it . . .

Carlson, 229 Mont. at 239, 745 P.2d at 1137 (citing Prosser and Keeton on The Law of Torts, § 32, 5th Edition (1984).

Whether or not expert testimony is required in any given case is left to the discretion of the trial court to decide under principles developed under Rule 702, Mont.R.Evid. The question of whether expert testimony is required to establish the standard of care depends on whether the agent's professional skills and expertise

are involved in the breach. If so, expert testimony allows the body of law regarding insurance agent liability to develop consistent with industry standards. In the present case, expert testimony was necessary to establish the standard of care for agents securing insurance on commercial property, and highlighted the industry standard of insuring all structures on the property.

E. Adoption of a professional standard of care for insurance agents in Montana allows the body of law regarding agent liability to develop in a predictable and cogent manner.

As articulated above, MTLA is advocating for the Court to find insurance agents have a duty to exercise the skill and knowledge consistent with the training and experience required for their profession. It is appropriate to fashion a standard of care comparable to that of other professions, which takes into consideration the unique circumstances of each relationship and is based on the reality of the insurance industry. Adoption of such a standard is a rational expansion of existing legal authority in Montana, is consistent with a number of other jurisdictions that have expanded insurance agent liability outside of the duty to procure requested insurance in a number of instances, and avoids piecemeal adoption of discrete duties for insurance agents.

1. The historical insurance agent liability analysis in Montana has been limited to the duty to procure, in contrast to the duty to advise, and this artificial distinction results in a body of law completely disjointed from the insurance industry and the experience of insurance consumers.

Since the turn of the century this Court has recognized the duty of an insurance agent towards an insured:

> [A]s between the insured and his own agent or broker authorized by him to procure insurance there is the usual obligation on the part of the latter to carry out the instructions given him and faithfully discharge the trust reposed in him, and he may become liable in damages for breach of duty.

Gay v. Lavina State Bank, 61 Mont. 449, 451, 202 P. 753, 755 (1921).

Ever since *Gay*, the obligation has been on the insured to request applicable insurance, thereby creating a duty in the agent to procure such insurance. "Montana law requires a client's request to procure certain insurance, followed by an agent's commitment to do the same to put the agent under a "duty" to procure." *R.H. Grover, Inc. v. Flynn Ins. Co.*, 238 Mont. 278, 284, 777 P.2d 338, 342 (1989) (citing *Lee v. Andrews*, 204 Mont. 527, 667 P.2d 919 (1983)); *Fillinger v. Northwestern Agency, Inc., of Great Falls*, 283 Mont. 71, 83, 938 P.2d 1347, 1355 (1997).

More recently in *Monroe v. Cogswell Agency et al,* 2010 MT 134, ¶11, ___ Mont. ___, ___ P.3d ___, this Court continued to articulate the same standard regarding the duty to procure, albeit leaving open consideration of a professional standard of care for anther day. In *Monroe* the plaintiffs alleged the insurance

agent not only failed to procure the request insurance, but also failed to advise them of their insurance needs. This Court ultimately held that in light of the well-established rule "that an insurance agent owes an absolute duty to obtain the insurance coverage which an insured directs the agent to procure," there was a question of fact as to whether the insurance agent had breached the duty to procure the requested insurance. *Monroe*, ¶32. This standard continues to squarely place the burden on the insured to ask for specific coverage—even though the insured may have no idea what to ask for. In effect, this standard deprives the consumer of the expertise of the insurance agent, which the consumer is reasonably relying upon.

The Court also found the specific facts in *Monroe* did not give rise to the Court considering whether or not the agent had a duty to advise the Monroes as to their insurance needs. This is because the plaintiff brought the claim against an agent who was not actually involved in the insurance transaction. In so ruling the Court withheld adopting a general professional standard of care for insurance agents, which conceivably would include a duty to advise in the appropriate circumstances. *Monroe*, ¶31.

2. Adoption of a general professional standard of care would apply in all cases against an insurance agent, not only in situations where breach of a duty to advise has been alleged.

Regardless of whether the specific breach involves failure to procure requested insurance, failure to properly advise the client as to their insurance needs, or any other breach, a professional standard of care should apply in all circumstances. For example, in this case application of a professional standard of care would have obligated the district court to substantively consider all the facts surrounding the transaction within the context of the expert opinion of Mr. Conkle. Instead, by centering solely on whether the duty to procure was triggered, the district court's myopic focus precipitated an absurd result that completely ignored the relationship between the parties, Wilhelm's actual knowledge of Hileman's insurance needs, and the reasonableness of Hileman's reliance on Wilhelm. Moreover, the district court's decision ignores the uncontroverted standard of care for the industry expressed by expert testimony, as well as Wilhelm's tactic admission he breached the standard of care.

3. Authority from other jurisdictions supports the expansion of insurance agent liability.

Some jurisdiction have adopted a professional standard of care for insurance agents,[3] while others have delineated a variety of conduct that can give rise to

[3] *Baranowski v. Safeco Ins. Co. of America*, 986 A.2d 334, 343, fn12 (Conn.App. 2010) (affirming trial court's exclusion of expert witnesses not qualified to testify

insurance agent liability, including: (1) duty to avoid ministerial mistakes defeating coverage;[4] (2) duty to make sure application is processed expeditiously;[5] (3) duty to see coverage is actually placed;[6] (4) duty to be knowledgeable of the conditions necessary for coverage;[7] (5) duty to determine client is eligible for coverage;[8] (6) duty to take reasonable steps to ensure the coverage is placed with a solvent or authorized insurer;[9] (7) duty to take reasonable steps not to allow a policy to lapse especially when there is a course of conduct in that regard;[10] (8) duty to advise that policy did not cover risk expected to be covered;[11] (9) duty to describe what policy does or does not cover;[12] and (10) duty to inform of gaps in insurance.[13]

These decisions demonstrate courts from a wide variety of jurisdictions have adopted expanded standards of care for insurance agents, beyond a duty to procure specific coverage. However, the result of these discrete decisions is to create a

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as to the standard of care "ordinarily possessed and exercised by the professional insurance agents in Connecticut in like circumstances during the relevant time frame"); *New Hampshire Ins. Co. v. Diller*, 678 F.Supp.2d 288 (D.N.J. 2009) (finding professional standard of care applies to all licensed persons, including insurance agents); *Webb v. Gittlen*, 174 P.3d 275, 276 (Ariz. 2008).

[4] *Stewart v. Boykin*, 303 N.E.2d 50 (Ga. App. 1983).

[5] *Haeuber v. Can-Do, Inc.*, 666 F.2d 275 (5th Cir. La. 1982).

[6] *Gulf-Tex Brokerage, Inc. v. McDade & Assoc.*, 433 F. Supp. 1015 (Tex. 1977).

[7] *Wheaton Nat'l Bank v. Dubek*, 376 N.E.2d 633 (Ill. App. 1978).

[8] *Bell v. Oleary*, 744 F.2d 1370 (8th Cir. Mo. 1984).

[9] *East Coast Management Ltd. v. Genatt Assoc., Inc.*, 801 N.Y.S.2d 705 (2005).

[10] *Werrman v. Aratusa*, 630 A.2d 302 (N.J. Super. 1993).

[11] *Bayly Martin and Fay, Inc. v. Pete's Sative, Inc.*, 706 P.2d 1283 (Colo. 1985).

[12] *Lusimano v. St. Paul Fire and Marine Ins. Co.*, 405 So.2d 1382 (La. App. 1981).

[13] *Louwagie v. State Farm Fire and Casualty Co.*, 397 N.W.2d 567 (Minn. App. 1986).

patchwork of legal standards across jurisdictions and within states. The better analysis, as adopted by some jurisdictions, is to adopt a professional standard of care, within which the conduct of the parties may be evaluated in an informed manner.

III. CONCLUSION

MTLA respectfully requests the Court to reverse the district court's decision granting *Defendant Wilhelm's Motion for Summary Judgment*, grant *Plaintiff's Motion for Summary Judgment Against Defendant Wilhelm*, or, in the alternative, remand for consideration of Defendant Wilhelm's liability under a professional standard of care requiring insurance agents to exercise the skill and knowledge consistent with the training and experience required for their profession.

RESPECTFULLY SUBMITTED this 12th day of July, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(e) of the Montana Rules of Appellate Procedure, I certify that the foregoing MTLA Amicus Brief is printed with a proportionally spaced Times New Roman typeface of 14 point; is double spaced; and the word count calculated by Microsoft WORD is 3,593, exclusive of the Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

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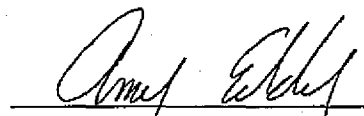

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